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## State v. Stewart Respondent's Brief Dckt. 41011

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IN THE SUPREME COURT OF THE STATE OF IDAHO

**COPY**

STATE OF IDAHO,

Plaintiff-Respondent,

vs.

VINCENT STEWART,

Defendant-Appellant.

No. 41011

Canyon Co. Case No.  
CR-2010-27270

**BRIEF OF RESPONDENT**

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF CANYON

HONORABLE GEORGE A. SOUTHWORTH  
District Judge

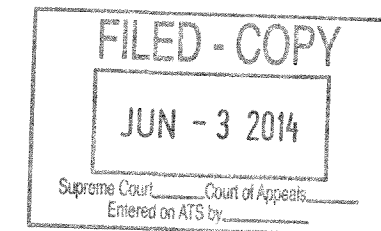
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## STATEMENT OF THE CASE

### Nature Of The Case

Vincent Stewart appeals from the district court's order revoking his probation and ordering his sentence executed. Stewart contends the district court (1) erred by revoking probation without transporting him to the revocation hearing; (2) abused its discretion by revoking probation; and (3) abused its discretion by failing to *sua sponte* reduce his sentence upon revocation.

### Statement Of Facts And Course Of Proceedings

Stewart was on probation when, during a home visit, his probation officer found him hiding in the basement. (R., p.9.) During a search of Stewart's home, law enforcement found paraphernalia used to smoke methamphetamine. (R., p.9.) Stewart admitted using one of the "methamphetamine smoking devices" to smoke methamphetamine. (R., p.9.) During a search incident to Stewart's arrest, an officer found a baggie in Stewart's sock, which contained a prescription anti-psychotic drug. (R., p.9.)

The state charged Stewart with possession of methamphetamine. (R., pp.12-13, 19-20.) Pursuant to a plea agreement, Stewart pled guilty to the possession charge and to domestic battery and petit theft in two other cases, and the state agreed to dismiss four pending misdemeanors and to recommend Mental Health Court. (R., pp.26-30.) On the possession charge, the court imposed a unified seven-year sentence with three years fixed and ordered it to run concurrent with the sentence in a separate Ada County case. (R., p.37.) The court, however, suspended the sentence and placed Stewart on probation

for four years. (R., pp.38-39.) Included among the special conditions of Stewart's probation was that he "attend and successfully graduate from the Canyon County Mental Health Court." (R., p.39.)

Less than one month later, Stewart failed to appear for Mental Health Court and the court issued a warrant for his arrest. (R., p.40-43.) At his subsequent Mental Health Court appearance, the court ordered Stewart to continue attending Mental Health Court while out of custody pending the disposition of Stewart's other cases. (R., p.47.) Approximately three months later, the court entered a supplemental judgment that continued Stewart on probation with the Mental Health Court condition. (R., pp.56-58.) Less than two months after that, the court imposed SILD as a sanction for his failure to "call in" or "show up for Health and Wellness." (R., p.59.) Although Stewart completed the SILD requirement, he failed to appear for his next monthly Mental Health Court appearance. (R., pp.61-62.) Consequently, the court again issued a bench warrant for Stewart's arrest and, following his arrest, ordered him to serve 14 days in jail. (R., pp.62-66.) Two months later, Stewart was "suspended from Mental Health Court for several violations of the rules." (R., p.69 (emphasis omitted).)

As a result of Stewart's Mental Health Court suspension as well as an allegation that Stewart committed new crimes, on October 23, 2012, the state filed a Petition for Probation Violation. (R., pp.73-80.) Stewart admitted the alleged probation violations. (R., pp.98-100.) At the disposition hearing held on March 7, 2013, the court tentatively agreed to Stewart's request to continue in

Mental Health Court, stating, in relevant part: "I do not know if they'll take you back there, sir. I'm certainly recommending and giving you that opportunity. If they don't, then you'll be in violation of this program, and I'll have to do something differently." (Tr., p.17, Ls.4-8; see also R., p.119 (Order on Probation Violation).)

On March 28, 2013, just two weeks after the disposition hearing, the state filed a Petition for Probation Violation alleging that, "on March 15, 2013, Mr. Stewart was denied as a participant in the Canyon County Mental Health Court program." (R., pp.120-123.) The court scheduled the matter for a "Review Hearing" on April 15, 2013, and counsel for Stewart filed a Motion to Transport Stewart to that hearing, which the court granted. (R., pp.124-127.) For reasons that are unclear, counsel for Stewart filed an identical Motion to Transport six days later; the court denied the second motion. (R., pp.128-131.)

The Review Hearing was conducted on April 19, 2013. (R., p.132.) At the outset of that hearing, the court stated:

This matter, Mr. Stewart previously appeared in front of this Court in March 2013. At that time the Court believed that Mr. Stewart, although he had been terminated from Mental Health Court was eligible for reinstatement and that in fact he could be reinstated. The Court then ordered he be continued on probation under the term and provision that he be reinstated to Mental Health Court.

I now have been advised that Mental Health Court has chosen not to allow him to go back and obtain Mental Health Court and that further he had Ada County cases in which he's been sentenced to prison and would be unable to attend Mental Health Court in any event.

Is that correct, [counsel]?

(Tr., p.19, Ls.4-20.)

Defense counsel responded: "That's correct, Judge. He has been -- they have revoked over in Ada County as well. He's actually out at the prison right now." (Tr., p.19, Ls.21-24; also p.19, Ls.24-25 (court confirms with defense counsel that Stewart was in prison at that time).) The court then stated:

At the prison. The Court declined to enter an order to transport him on the basis of Mr. Stewart's inability to complete the probation as ordered for reinstatement in Mental Health Court. The Court revokes his probation, that probation order, will impose a sentence of three years followed by an indeterminate four-year period of time for a total of seven years.

(Tr., p.20, Ls.1-8.)

Defense counsel inquired whether the judge would recommend the therapeutic community while Stewart was in custody, and the court agreed. (Tr., p.20, Ls.12-20.) Defense counsel made no other requests or objections at that time. (See generally Tr., pp.19-21.)

On April 26, 2013, Stewart filed a Rule 35 motion requesting leniency in his sentence. (R., pp.139-141.) The court denied the motion. (R., pp.144-146.) Stewart filed a timely notice of appeal from the Judgment and the order denying his Rule 35 motion. (R., pp.142-150.)



## ISSUES

Stewart states the issues on appeal as:

1. Did the district court violate Mr. Stewart's constitutional right to due process when it revoked Mr. Stewart's probation in his absence?
2. Did the district court abuse its discretion when it revoked Mr. Stewart's probation?
3. Did the district court abuse its discretion when it failed to reduce Mr. Stewart's sentence, *sua sponte*, upon revoking his probation?

(Appellant's Brief, p.5.)

The state rephrases the issues on appeal as:

1. Has Stewart failed to show the district court erred in changing its disposition decision in Stewart's absence or in otherwise revoking his probation?
2. Should this Court decline to consider Stewart's claim, raised for the first time on appeal, that the district court erred in failing to *sua sponte* reduce Stewart's sentence upon revoking his probation?

## ARGUMENT

### I.

#### Stewart Has Failed To Show Error In The Process By Which The Court Amended Stewart's Probation Violation Disposition Or In The Court's Decision To Revoke His Probation

##### A. Introduction

Stewart argues "the district court violated his constitutional right to due process when it revoked his probation outside his presence." (Appellant's Brief, p.6.) Stewart further asserts the court "abused its discretion when it revoked his probation." (Appellant's Brief, p.8.) Both of these arguments fail. The district court's decision to amend the disposition of Stewart's probation violations, which Stewart admitted, without transporting him to announce that amendment did not, on the facts of this case, violate Stewart's constitutional rights. Nor has Stewart shown the court abused its discretion by revoking his probation given Stewart's failure to comply with the fundamental condition of continuing him on probation - that he attend and complete Mental Health Court.

##### B. Standard Of Review

The decision to revoke probation is reviewed for an abuse of discretion. State v. Sanchez, 149 Idaho 102, 105, 233 P.3d 33, 36 (2009) (citing State v. Lafferty, 125 Idaho 378, 381, 870 P.2d 1337, 1340 (Ct. App. 1994)).

C. The Court's Decision To Amend Its Disposition Of Stewart's Probation Violation Without Transporting Stewart Was Not Unconstitutional And Stewart Has Otherwise Failed To Show Error In The Court's Revocation Decision

In State v. Done, 139 Idaho 635, 637, 84 P.3d 571, 573 (Ct. App. 2003), the Court summarized the due process standards applicable to probation revocation decisions as follows:

[B]efore probation can be revoked, a probationer must be given a due process hearing. Throughout probation revocation proceedings, the probationer is entitled to due process. The probationer is entitled to be present at the hearing and may be entitled to counsel. The probationer must be afforded the opportunity to be present and rebut evidence and to call and cross-examine witnesses. Prior to the hearing, the probationer must be given adequate notice of the grounds for revocation.

Stewart's due process rights were satisfied in relation to the allegation that he violated his probation by being suspended from Mental Health Court. The state's original Petition for Probation Violation on this basis was filed on October 23, 2012. (R., pp.73-77.) At the December 19, 2012 evidentiary hearing scheduled in relation to the state's petition, Stewart admitted the allegations in the petition, including the allegation that reads, in relevant part: "on October 17, 2012, Mr. Stewart was suspended from the Canyon County Mental Health Court program for program non-compliance." (R., pp.76, 98-99.) Prior to the disposition hearing, Stewart explored the possibility of going back to Mental Health Court "pending court approval and the outcome of [a] 19-2524 Mental Health Evaluation." (R., pp.107-108.) Consistent with those efforts, Stewart filed a motion for a mental health evaluation, which the district court granted. (R., pp.111-114.) However, that evaluation was not provided to the court prior to

disposition. (Tr., p.6, Ls.18-19.) Nevertheless, defense counsel asked the court to consider allowing Stewart to continue participating in Mental Health Court, arguing:

He's learned a lot from Mental Health Court and wants to continue to do the option of continuing on. And I do believe that that is a viable option for him. I know that whether or not he gets accepted back in is, you know, determined by their vote and what this Court decides to do today as well. But Judge, we would ask the Court to consider placing my client back into Mental Health Court.

(Tr., p.9, Ls.8-16.) Stewart also urged the court to allow him the opportunity to complete Mental Health Court. (Tr., p.10, L.23 – p.13, L.14.)

The court responded:

Mr. Stewart, you having admitted violating your probation, I do find that you are in violation of your probation. I am going to impose the sentence previously suspended of three fixed followed by four indeterminate for a total of seven years. I will suspend the execution of that sentence and place you back on probation on terms, same terms and conditions previously imposed, which includes successful completion of the Mental Health Court program.

**I do not know if they'll take you back there, sir. I'm certainly recommending and giving you that opportunity. If they don't, then you'll be in violation of this program, and I'll have to do something differently.**

(Tr., p.16, L.19 – p.17, L.8 (emphasis added).)

Upon being notified that Stewart was not eligible for reinstatement to Mental Health Court, the court did precisely what it told Stewart it would have to do at the disposition hearing – “something different[]” – that something different being the only real option, revocation, given that any type of probation would be effectively meaningless since, by that time, Stewart was in prison on other charges. (See Tr., p.19, Ls.14-25.)

Although the state filed a second Petition for Probation Violation upon being notified of Stewart's non-acceptance back into Mental Health Court, the April 19, 2013 hearing was not an adjudication of that petition as much as it was a continuation of the March 7, 2013 disposition, since the disposition contemplated on that date could not be given effect. The practical reality, therefore, is that Stewart was given notice and an opportunity to be heard, *i.e.*, due process, on both whether he violated his probation and on the disposition of that violation having been present at the adjudication hearing, where he pled guilty, the original disposition on March 7, 2013, and, through counsel at the April 19, 2013 hearing. Stewart has made no reasoned argument explaining how, on the facts of this case, he was deprived of meaningful notice and an opportunity to be heard on whether he violated his probation, which he admitted, or whether his probation should be revoked – especially given the lack of any viable alternatives to revocation. Cf. State v. Iverson, 155 Idaho 766, \_\_\_, 316 P.3d 682, 693 (Ct. App. 2014) (noting “[d]ue process demands an opportunity to be heard at a meaningful time and in a meaningful manner” and requiring a showing of prejudice); State v. Crockett, 151 Idaho 674, 679, 263 P.3d 139, 144 (Ct. App. 2011) (in the context of a due process claim relating to dismissing and refilling charges, court notes the “prejudice component of the due process inquiry requires that a defendant show actual prejudice affecting his or her ability to mount or present a defense”).

Instead, Stewart shifts his argument from the claimed due process violation, which is based purely on his absence from the April 19, 2013, without

any explanation as to how his presence would or could have changed the disposition, to a secondary argument that revocation was improper because he “did not admit to violating his probation” and his failure to gain “re-entry” into Mental Health Court was not willful. (Appellant’s Brief, p.8.) This argument misses the point because it ignores the actual proceedings in this case. The court did not “find” that Stewart violated his probation “by being denied re-entry” into Mental Health Court. The court’s amended disposition did not involve a finding of a new violation, it was a continuation of the March 7, 2013 disposition. This view is consistent with the court’s characterization of the April 19, 2013 hearing as a “Review Hearing” – a characterization to which Stewart did not object. Indeed, although counsel for Stewart sought to have Stewart transported to the Review Hearing, at no time did he notify the district court of any desire to proceed as if the court were considering a new violation.<sup>1</sup> On the facts of this case, this Court should not endorse Stewart’s efforts to do so for the first time on appeal.<sup>2</sup>

Even if the Court considers Stewart’s claim that his failure to gain “re-entry” into Mental Health Court was not a willful violation, the claim fails. It is readily apparent that Mental Health Court was a fundamental condition of

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<sup>1</sup> It is likely defense counsel did not make any such objection because he recognized it would not benefit Stewart to remain on probation in this case while in prison on another case, which would preclude Stewart from receiving credit for time served on his current sentence in this case.

<sup>2</sup> To the extent this Court concludes Stewart’s inability to be placed back into Mental Health Court as contemplated by the March 7, 2013 disposition was a separate probation violation that should have been treated as such, the state concedes the standard due process protections were not satisfied as there was no separate arraignment or adjudication of that alleged violation.

Stewart's probation and the court's willingness to continue him on probation was premised on Stewart being accepted back into Mental Health Court. Stewart's counsel plainly acknowledged that Stewart could not continue in Mental Health Court and, as the district court noted at the April 19, 2013 hearing (and counsel agreed), Stewart "would be unable to attend Mental Health Court in any event" because he was "sentenced to prison" in his Ada County cases. (Tr., p.17, Ls.14-19.) "After sound determination that a probationer could not possibly perform a fundamental condition of his probation, the judge has discretion to remove probation and pronounce sentence." State v. Oyler, 92 Idaho 43, 47, 436 P.2d 709, 713 (1968). That is precisely the determination the district court made in this case and Stewart has failed to show that determination was erroneous. Not only was Stewart unable to comply with a fundamental condition of his probation, his probation was clearly not consistent with the protection of society as he continued to commit new crimes during his probationary term. See State v. Wilson, 127 Idaho 506, 510, 903 P.2d 95, 99 (Ct. App. 1995) ("The purpose of probation is rehabilitation" and any cause satisfactory to the court that probation is not meeting its goals, is sufficient to justify revocation.); State v. Leach, 135 Idaho 525, 529, 20 P.3d 709, 713 (Ct. App. 2001) ("In deciding whether revocation of probation is the appropriate response to a violation, the court considers whether the probation is achieving the goal of rehabilitation and whether continued probation is consistent with protection of society."). The district court did not abuse its discretion in revoking Stewart's probation.

II.

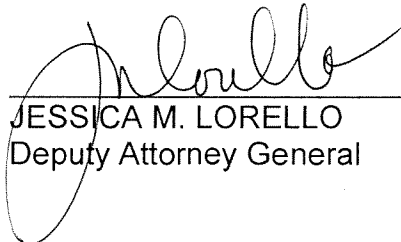
Stewart's Claim That The District Court Abused Its Discretion By Not *Sua Sponte* Reducing His Sentence Upon Revocation Is Not Preserved For Appeal

Stewart asserts the district court abused its discretion when it failed to *sua sponte* reduce his sentence upon revoking probation. (Appellant's Brief, pp.12-16.) Although Stewart actually filed a Rule 35 motion, which the district court denied, he does not seek review of that decision, instead challenging the district court's failure to *sua sponte* reduce the sentence it later expressly stated should not be reduced. Stewart's chosen tactic for challenging his sentence is not preserved for appeal and he cannot obtain review of this claim under the fundamental error doctrine because he cannot satisfy the first prong of the fundamental error analysis – a constitutional violation – because his claim is based on an alleged rule violation. State v. Clontz, 2014 WL 2119164 (Idaho App. 2014). Stewart's sentencing argument, therefore, fails.

CONCLUSION

The state respectfully requests that this Court affirm the district court's order revoking Stewart's probation and ordering his sentence executed.

DATED this 3<sup>rd</sup> day of June, 2014.

  
JESSICA M. LORELLO  
Deputy Attorney General



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 3<sup>rd</sup> day of June, 2014, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

SALLY J. COOLEY  
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.

  
\_\_\_\_\_  
JESSICA M. LORELLO  
Deputy Attorney General